No. 50122-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ANTHONY DWAIN DAVIS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 95-1-00160-4
The Honorable Jerry Costello, Judge

AMENDED OPENING BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

1. Anthony Davis' due process rights were violated when he was sentenced as a persistent offender using prior convictions that are constitutionally invalid on their face.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Is reversal required where the trial court included prior convictions in Anthony Davis' criminal history even though they were constitutionally invalid on their face? (Assignment of Error 1)

2. Is Anthony Davis' 1995 Judgment and Sentence constitutionally invalid on its face because it includes prior convictions in his criminal history that were constitutionally invalid on their face? (Assignment of Error 1)

III. STATEMENT OF THE CASE

Anthony Dwain Davis pleaded guilty on July 12, 1995 to one count of first degree rape. (CP 242-46) He disputed his offender score calculation, which according to the State included 1986 convictions for attempted robbery in the second degree and two counts of burglary in the first degree. (CP 243) The sentencing court found that Davis was a persistent offender and imposed a term of life without the possibility of parole. (CP 316-17) Davis'

subsequent direct appeal was dismissed after appellate counsel found no nonfrivolous issues to raise. (CP 329, 355-59)

In 2010, Davis filed a Personal Restraint Petition under the 1986 cause number, seeking to invalidate his 1986 convictions. (CP 479) Davis argued that the Judgment and Sentence was invalid on its face because it lists an incorrect standard range and maximum sentence for the attempted second degree robbery offense. (CP 479-80) The Supreme Court agreed that the Judgment and Sentence was invalid on its face. (CP 480) But the Court declined to vacate the 1986 convictions or to allow Davis to withdraw his guilty plea in that case because his claim was time-barred and he could not show that he was prejudiced by the mistake. (CP 480-81)

On October 14, 2016, Davis filed a pro se "Petition for Writ of Habeas Corpus," asserting that the 1995 Judgment and Sentence is invalid on its face because the convictions contained in the facially invalid 1986 Judgment and Sentence were used to sentence him as a persistent offender. (CP 56-64, 503-14) Davis asked to be resentenced without the inclusion of the 1986 attempted robbery conviction. (CP 62-63; RP 4-8) The Superior Court denied the petition. (CP 515-17) The court found "no lawful

basis to re-sentence Mr. Davis" because the 1986 Judgment and Sentence has never been invalidated by any reviewing court. (CP 516-17) Davis timely filed a Notice of Appeal. (CP 524-25)

IV. ARGUMENT & AUTHORITIES

Generally, a collateral attack must be filed within one year of a judgment becoming final. RCW 10.73.090(1). There are a number of exceptions to this one-year requirement, including a judgment and sentence that is facially invalid. RCW 10.73.090(1), .100. Davis argued below that his 1995 Judgment and Sentence is facially invalid, and thus not subject to the one-year limit, because the sentencing court relied on the facially invalid 1986 Judgment and Sentence to find that he was a persistent offender.

A judgment and sentence is invalid on its face if it evidences an infirmity without further elaboration. *In re Pers. Restr. of Stoudmire,* 141 Wn.2d 342, 353, 5 P.3d 1240 (2000); *In re Pers. Restr. of Thompson,* 141 Wn.2d 712, 718, 10 P.3d 380 (2000). Documents associated with a guilty plea can be considered in determining facial validity. *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986); *Thompson*, 141 Wn.2d at 718; *State v. Phillips*, 94 Wn. App. 313, 317, 972 P.2d 932 (1999).

First, the 1986 Judgment and Sentence is invalid on its face.

Due process mandates that a plea must be made with knowledge of all of its direct consequences, and it is well-settled that the maximum term is a direct consequence of any plea. *See State v. Morley,* 134 Wn.2d 588, 621, 952 P.2d 167 (1998); *State v. Ross,* 129 Wn.2d 279, 284-87, 916 P.2d 405 (1996); *State v. Miller,* 110 Wn.2d 528, 531, 756 P.2d 122 (1988).[1] In this case, the 1986 plea agreement and Judgment and Sentence show that Davis was affirmatively misinformed about the standard range and maximum sentence for attempted robbery.[2] As the Supreme Court found in its 2013 ruling on Davis' personal restraint petition, the 1986 Judgment and Sentence is "facially invalid in that respect." (CP 480)

The 1986 plea form and the Judgment and Sentence were presented to the trial court as part of the plea and sentencing in this 1995 case. (CP 247-52, 253-56) Although Davis disputed his

[1] As part of the state and federal constitutional rights to due process, a plea is only valid if it is knowing, voluntary and intelligent. U.S. Const. Amd. XIV; *Henderson v. Morgan*, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed 2d 108 (1976); Wash. Const. Article I, § 3; *Wood v. Morris*, 87 Wn.2d 501, 505, 554 P.2d 1032 (1976).

[2] The plea agreement states that the statutory maximum for attempted second degree robbery is 20 years to life. (CP 247) The Judgment and Sentence state that the standard range is 33-43 months and the statutory maximum is 10 years. (CP 254-55) In fact, the standard range is 11.25-15 months and the statutory maximum is five years. *See* RCW 9A.56.201, 9A.28.020(3)(b); RCW 9A.20.021(1)(b).

offender score and persistent offender status, the trial court used the obviously facially invalid 1986 convictions to find that Davis was a persistent offender and imposed a life sentence. (CP 243, 317) These offenses should not have been counted as part of Davis' criminal history. *Ammons*, 105 Wn.2d at 187-88.

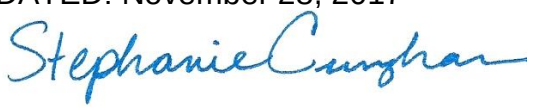
A sentence is facially invalid if the trial court lacked authority to impose the challenged sentence. *In re Pers. Restr. of Coats*, 173 Wn.2d 123, 135-36, 267 P.3d 324 (2011). A sentencing court cannot consider a prior conviction that is constitutionally invalid on its face. *Ammons*, 105 Wn.2d at 187-88. Thus, the 1995 Judgment and Sentence is also facially invalid.

Davis can show actual and substantial prejudice, because he is currently serving the life sentence imposed in the 1995 case. *See In re Pers. Restraint of Cook,* 114 Wn.2d 802, 810, 792 P.2d 506 (1990). It is clear from the record that the 1995 sentencing court included convictions that were constitutionally invalid on their face when it compiled Davis' criminal history and determined that he was a persistent offender. This Court should order resentencing based upon a corrected criminal history that does not include those offenses in its calculation. Reversal and remand is required.

V. CONCLUSION

This Court should reverse and remand for resentencing based upon an offender score which does not include the constitutionally invalid 1986 convictions.

DATED: November 28, 2017



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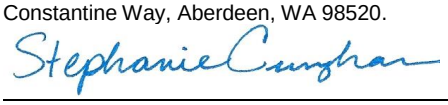
CERTIFICATE OF MAILING

I certify that on 10/28/2017, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Anthony D. Davis, DOC# 259315, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



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